(App. 19-20) are unreported. The 1965 opinion of the Supreme Court of Illinois (Appendix A, pp. 1a-5a, *infra*) affirming petitioner's conviction is reported at 32 Ill. 2d 76, 203 N.E.2d 875.

JURISDICTION

The order of the Court of Appeals affirming the denial of the petition for habeas corpus was entered on October 8, 1970. The petition for a writ of certiorari was filed on October 20, 1970, and was granted on March 29, 1971. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Under this Court's limited grant of certiorari the following questions are presented:

1. Whether a standard other than proof beyond a reasonable doubt may constitutionally be utilized by a trial judge making a preliminary determination under *Jackson v. Denno*, 378 U.S. 368 (1964), as to the voluntariness of a criminal accused's confession sought to be introduced by the prosecution.

2. Whether the trial judge's conclusion that a confession has been voluntarily given is binding on the trial jury and forecloses the jury's independent consideration of the issue of voluntariness.

STATEMENT

Petitioner was charged in a two-count indictment returned on January 12, 1961, in the Superior Court of Cook County, Illinois, with armed robbery committed against one Raymond Termunde on January 1, 1961 (Supp.R.[1] 1-4). Counsel was assigned for him on January 19, and trial was set for February 21, 1961 (Supp.R. 7-11). On the date of trial, petitioner moved to suppress a statement taken from him at the time of his arrest on the ground that it had been given involuntarily (App. 23). A note handed by petitioner to his counsel and read to the court at the outset of the trial stated that petitioner had, on his arrest, taken a "beating * * * about the head and spine, by one, Stanley Thoms, Police Chief of Alsip, Illinois" and that this beating had caused him to "suffer from blackout spells" (Supp. R. 35).

The trial court thereupon held a hearing on the voluntariness of the confession. The evidence at the hearing established that petitioner had been arrested at the home of the victim—which was the scene of the crime—by the chief of police of the village of Alsip, who was a neighbor and old classmate of the victim (Supp.R. 42-43) and who arrived on the scene in answer to a telephone call (Supp.R. 41).[2] Petitioner was taken from the scene of the crime to the one-room Alsip police station in a police car, and the disputed confession was made in answer to questions asked at the station (Supp.R. 38). There was a conflict in the testimony as to whether petitioner had been beaten over his head and neck with the butt of a gun by Chief Thoms in the police car and kicked and beaten by a police lieutenant after arriving at the station. Petitioner testified that he had been so

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[1] "Supp.R." indicates the "Supplement to original record on appeal filed April 29, 1970" which contains the original indictment and trial transcript.

[2] The victim's daughter, who was in the home with her two brothers and her father, testified during the trial that she called the chief of police at her father's instructions (Supp. R. 175).

beaten (Supp.R. 75-76, 78-79), and that the lieutenant told him that he would "be lucky if [he] was . . . delivered to the County Jail without being killed" because his victim (who testified at trial) "was well thought of." (Supp.R. 79). Chief Thoms and four police officers (including the lieutenant specified by the petitioner) denied having beaten petitioner or seeing any other police officer beating him (Supp.R. 40, 50, 57, 64, 93, 101-102, 106, 111-113).

Introduced into evidence by petitioner in the course of the hearing was a photograph taken of him at the County Jail on the day after his arrest (Supp.R. 59). The photograph apparently showed the left side of petitioner's face to be swollen (Supp.R. 60), and also showed traces of blood on his face (Supp.R. 90).[3] Although petitioner admitted having had a "scuffle" with the victim in which his face was scratched (Supp.R. 76, 85-86), he testified that the condition of his face shown on the photograph was attributable to the beating with the gun butt he had received from Chief Thoms in the car (Supp.R. 75-76, 83-84). He also testified that he was examined and treated by doctors on the night of January 1 and again on his arrival at the jail on January 2 (Supp.R. 83-85). Chief Thoms testified that petitioner "had this blood on his face" when he first saw him on entering the victim's home (Supp.R. 45, 48), and the police officer who had been at the scene of the crime supported his chief's testimony (Supp.R. 63, 67-68).

The confession—which, in its written form, was read to the jury at petitioner's trial (Supp.R. 238-241)—was reduced to nineteen questions and answers, at the conclusion of which the following appeared (Supp.R. 241):

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[3]The photograph was introduced in evidence at the hearing, but is not in the original record here. Respondent's counsel has assisted petitioner's counsel in efforts to find it, but these have proved fruitless. There seems, however, to be no dispute over the fact that petitioner's face showed some laceration on the date in question, the only conflict being over the source of the wounds.

> After reading the above statement, and having given the above answers, knowing them to be the truth, and being able to read and write English, and having no promises or threats being made to sign this statement will you do so?
>
> My answer is no. I refuse to sign this statement. I wish to see a doctor and an attorney.

In addition to the written answers, Chief Thoms testified in the presence of the jury that petitioner told him that he had come to Alsip because "they were too hot after me in Chicago" (Supp.R. 201) and that petitioner had also said, "You can't do nothing to me anyway, I am on dope" (Supp. R. 202).

Petitioner testified that he answered the questions because he had been beaten and then threatened by the lieutenant in the police station (Supp.R. 81). Before the jury, petitioner repeated that he had given the statement "under threats" and that "[t]hey try to make me sign it by threats but I didn't sign it but I did give them the statement" (Supp. R. 259). He did not, however, challenge the truth of the answers given in the statement (*ibid.*).

Two individuals who had, according to the police officers' testimony, observed petitioner's arrest and interrogation were not called to testify. One was a local judge who was asked by Chief Thoms to witness the interrogation (Supp.R. 39, 54), and the other was a teen-age boy who was in the car in which Thoms brought petitioner to the station (Supp.R. 115).

At the conclusion of the hearing, the trial judge denied the motion to suppress. He said (App. 25):

> The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

> I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself.

The prosecution's witnesses during the jury trial were the victim, his daughter, Chief Thoms, and two of the police officers. The written questions and answers were read to the jury at the conclusion of the prosecution's case. The only witness for the defense was the petitioner, who testified that he had been in a stupor under the influence of alcohol and barbiturates during the time of the offense (Supp. R. 247-250).

Although petitioner's testimony regarding the threats made to him was admitted (Supp.R. 257-259) and Chief Thoms testified in rebuttal that he had not beaten or otherwise done bodily harm to the petitioner (Supp.R. 277-278), the jury was not instructed to make any separate evaluation of the voluntariness of the confession (Supp.R. 303-311). Reference was made to the confession during the initial and rebuttal summations of the prosecutors (Supp. R. 286, 287, 299). The jury found petitioner guilty of armed robbery and he was sentenced to a 25-to-50-year term of imprisonment (Supp.R. 324).

On direct appeal to the Supreme Court of Illinois, the conviction was affirmed. 32 Ill. 2d 76, 203 N.E.2d (pp. 1a-5a, *infra*). Recognizing that it "may have been better practice for the State to have called Judge Robinson and the boy" (p. 4a, *infra*), the Illinois Supreme Court held that "the trial judge's ruling that the confession was voluntary was not against the manifest weight of the evidence" (*ibid.*).

Petitioner instituted the present proceeding on April 8, 1969, by filing a petition for habeas corpus in the United States District Court for the Northern District of Illinois (App. 3-7).[4] The petition squarely presented the issues

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[4]He had sought federal and State post-conviction remedies on three earlier occasions. See note 1 of the District Court's opinion of January 13, 1970 (App. 13).

now before this Court on the limited grant of certiorari. After first denying the petition on the ground that petitioner had not exhausted his State remedies (App. 8-10), District Judge Hubert Will granted a petition for rehearing and considered the merits of the constitutional claim (App. 13-18). He concluded that the Illinois procedure whereby, in a preliminary hearing, a judge decides, by the standard of proof "normally used to determine the admissibility of evidence" (App. 17), whether an accused's confession was voluntarily given satisfies the constitutional requirements. He also held that an accused is entitled only to "one forum where the voluntariness issue can be evaluated without any regard to its truth" (App. 18) and, apparently on this basis, rejected the claim that the voluntariness of the confession should have been submitted to the jury.

Judge Will then found that "a determination of the question by the Court of Appeals would be helpful" (App. 20) and granted leave to appeal in forma pauperis. The Court of Appeals, however, refused to assign counsel[5] or hear oral argument. In a brief order, it affirmed the judgment of the District Court (App. 21-22).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, in its present posture, challenges two aspects of the procedure prescribed by the decisions of the highest court of the State of Illinois for determining the voluntariness of an accused's post-arrest confession. No claim is made here—nor was any made below—that the hearing given petitioner on the factual issue in the trial court was inadequate in any other respect. We have, however, sketched the outline of the conflicting testimony relating to the confession in our Statement because we believe that it demonstrates that a reasonable trial judge, considering the demeanor of the witnesses, could have concluded that a reasonable

[5] Order of March 24, 1970, appended to the Petition for a Writ of Certiorari.

doubt existed as to whether petitioner's statement was voluntary. Both the condition of petitioner's face on the day after his arrest and the fact that he refused to sign the statement after it was reduced to writing—and asked instead to see a doctor—tended to support his version of the events. In this context, the issue of burden of proof became all-important.

1. Although the trial judge made no specific mention of the standard he used in deciding that the confession was voluntary, it may be fairly assumed that he applied Illinois law. In *People v. Thomlinson*, 400 Ill. 555, 561, 81 N.E.2d 434, 437 (1948), the Illinois Supreme Court held that a trial judge may admit an accused's confession in evidence if he is satisfied, on a preponderance of the evidence, that it was voluntarily given. That standard, we submit, violates the Fourteenth Amendment rights of the petitioner because it is an inadequate criterion by which to make this critical determination in a criminal case.

We contend that the proper standard—approved by most of the federal courts which have considered the issue—is that the confession must be shown to have been voluntary beyond a reasonable doubt. We argue that this is the proper standard for all preliminary determinations regarding evidence allegedly obtained in violation of the Constitution. We also maintain, alternatively, that when evidence which the prosecution seeks to admit may infringe on the Fifth Amendment privilege against self-incrimination and is as probative of guilt or innocence as a post-arrest confession, the Constitution requires that its voluntariness be determined by the reasonable-doubt standard. And finally, we point out that when, as is true under Illinois procedure, the jury has no option to disregard the confession entirely if it finds it involuntary, the use of a standard lower than beyond-a-reasonable-doubt weakens the protection given a criminal defendant by this Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), and puts him to an intolerable choice at trial.

2. No instruction was given to the jury on the question of the voluntariness of the confession, and under Illinois law "it is the function of the trial judge to determine [whether the confession was voluntary] * * *, and the jury can determine only the weight to be given to a confession once the trial court has ruled that it is admissible." *People v. Stacey*, 25 Ill.2d 258, 269, 184 N.E.2d 866, 871 (1962).[6]

We argue that this procedure—particularly when combined with a lower standard of proof than beyond-a-reasonable-doubt—violates the rule of *Jackson v. Denno, supra*, as well as the constitutional right to a trial by jury recognized in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

ARGUMENT

I. THE VOLUNTARINESS OF A CONFESSION SHOULD BE DETERMINED BY THE SAME CONSTITUTIONAL STANDARD OF PROOF APPLICABLE FOR EVERY ESSENTIAL ELEMENT OF AN OFFENSE.

In *In re Winship*, 397 U.S. 358 (1970), this Court—resolving any remaining "doubt about the constitutional stature of the reasonable-doubt standard"—squarely and unequivocally held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

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[6] In *People v. Guido*, 321 Ill. 397, 420, 152 N.E. 149, 158 (1926), the Supreme Court of Illinois said:

> Whether the confessions are of such a character as to entitle them to be considered by the jury is a question for the court. Whether they are true or false or partly true and partly false is a question for the jury. When confessions or admissions have been admitted in evidence the jury cannot disregard them but are bound to consider and weigh them and give them such credit as they may be entitled to in the judgment of the jury. The statement that it is the duty of the jury to disregard confessions unless they are satisfied beyond a reasonable doubt that they were made freely and voluntarily is contrary to the law as heretofore stated in this opinion.

which he is charged." 397 U.S. at 364. Only Mr. Justice Black dissented from that part of the Court's decision, the other two dissenting Justices (the Chief Justice and Mr. Justice Stewart) disagreeing merely with the majority's application of that standard to juvenile court proceedings. The initial issue in this case is whether the now-clear Fourteenth Amendment standard of proof governing "every fact necessary to constitute the crime" also applies to the voluntariness of a confession sought to be introduced by the prosecution as part of its direct case. We argue below that the reasonable-doubt standard is constitutionally mandatory when the voluntariness of a confession is put in issue on three grounds:

1. We contend first that whenever in a criminal trial the admissibility of any evidence is challenged on the ground that it was unconstitutionally secured, the prosecution must satisfy the finder of fact, by the reasonable-doubt standard, that the evidence to be introduced was lawfully obtained. This argument, which is based on the importance to the administration of justice of insuring that the protection given by the reasonable-doubt standard is not undermined by the use of lesser standards of proof in preliminary decisions to admit evidence, closely follows the careful analysis given this issue in *United States v. Schipani*, 289 F. Supp. 43, 54-60 (E.D.N.Y. 1968), *affirmed on conviction*, 414 F. 2d 1262 (2d Cir. 1969), the relevant portion of which is reprinted as Appendix B to this brief (pp. 1b-12b, *infra*).

2. Our second argument is that irrespective of the rule which may be applied to situations involving other kinds of unconstitutionally obtained evidence, the gravity of the harm resulting from the introduction of an accused's confession and the nature of the constitutional right being protected permit only confessions proved voluntary beyond a reasonable doubt to be used as evidence. That argument follows the reasoning of the Court of Appeals for the District of Columbia Circuit on rehearing en banc in *Pea v. United States*, 397 F.2d 627, 637 (1967), adopting the concurring opinion in *Clifton v. United States*, 371 F.2d 354,

360 (1966). The relevant portions of those opinions are reprinted as Appendix C to this brief (pp. 1c-7c, *infra*).

3. Our third argument is that the establishment of a reasonable-doubt standard for preliminary determinations of voluntariness is necessary to carry out the additional safeguard to a criminal accused granted by this Court's decision in *Jackson v. Denno*. 378 U.S. 368 (1964). For if a lesser standard of proof is permitted to render a confession admissible on the judge's preliminary consideration of voluntariness, less protection is given to an accused whose confession cannot be proved voluntary beyond a reasonable doubt under the *Jackson v. Denno* rule than under the procedure found constitutionally invalid in that case.

A. A Trial Judge's Ruling on Whether Prosecution Evidence Has Been Unconstitutionally Obtained Must be Made by the Reasonable-Doubt Standard.

There can be no doubt since *In re Winship, supra,* as to the quantum of proof constitutionally required in a State prosecution for every factual element of an offense. And in *Chapman v. California,* 386 U.S. 18 (1967), the very same strict standard was applied by this Court to the administration of the "harmless-error rule"—*i.e.*, to insure that a criminal defendant is not prejudiced by constitutional error committed at his trial, an appellate court may affirm his conviction only if it is "able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." 386 U.S. at 24.

The heavy burdens fixed by *Winship* and *Chapman* rest on fundamental policy assessments regarding criminal justice and the judicial process such as those expressed by Mr. Justice Harlan in his concurring opinion in *Winship*. 397 U.S. 368-375. Essentially, they come down to the proposition that "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." 397 U.S. at 372. The requirements of "fundamental procedural fairness," there-

fore, demand that the facts upon which a conviction rest be so unequivocally established by the proof at trial that no reasonable doubt remains.

The *Winship* and *Chapman* decisions, in combination, require that the reasonable-doubt standard be applied to *all* preliminary factual determinations regarding prosecution evidence that has allegedly been obtained by unconstitutional means. For if a lesser standard of proof is permitted at this juncture, the constitutional assurance can be undermined by preliminary determinations on admissibility made on proof which is less than clear and convincing.

The effect of a rule such as that permitted by the courts below in this case was carefully analyzed in *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y. 1968), on remand from this Court (385 U.S. 372), by District Judge Jack B. Weinstein (formerly Professor of Evidence at Columbia University Law School), as follows (289 F.Supp. at 56-57; pp. 7b-8b, *infra*):[7]

> Let us suppose, solely for the sake of analysis, that the burden on the government is to prove by a preponderance that a proferred document with high probative force was not obtained in violation of the law. Assume that exclusion depends upon an extrinsic policy designed to protect constitutional rights and to discourage obtaining evidence illegally. Suppose that the only material proposition in the case is whether defendant had certain knowledge (as that the power he possessed was a narcotic). Let us suppose that the only evidence on the point is a letter from the defendant and that it would permit a jury to find beyond a reasonable doubt (95+% probable, for the purposes of this analysis) that he did have knowledge.
>
> Now, if we suppose that the judge has decided that there is a question about whether the docu-

[7] On appeal from the conviction, the Court of Appeals for the Second Circuit stated, with regard to this aspect of the case, "We approve the legal principles applied." 414 F.2d at 1266.

ment was illegally obtained but that there is a bare preponderance (50+% probable) in favor of the government's contention that it was legally obtained, the judge will, on the assumptions made, admit it. The question of whether the document was or was not illegally obtained is not considered by the jury and normally it will not have before it evidence bearing on this question. Thus, the jury will give the document its full probative weight and it will find the defendant guilty beyond a reasonable doubt.

Whether such a result in a criminal case is proper depends upon how the rule of law is stated. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by evidence properly admitted in the trial*" the verdict should stand. The trier might have concluded that the probability of knowledge was 95+% if he assessed the document solely on the basis of its probative force. However, if it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by legally obtained evidence*," there is doubt about the validity of the conviction. If the probative force is discounted by the probabilities relating to the illegality, then the total probative force of all the relevant evidence might well have fallen below 95+%. The documentary line of proof would not then have a force of 95+% probability but of (95+ x 50+)%, or somewhere in the order of $50+%. See Ball, the Trial Court: Probability Theory and Jury Issues, in Communication Sciences and Law: Reflections from the Jurimetrics Conference, 189-90 (Allen and Caldwell, eds., 1965).

This attenuation of probabilities results from the fact that, where variables are independent and the probability of a combination of variables is to be determined, the probability of each variable is multiplied by the probability of each other variable. See, e.g., Hoel, Elementary Statistics, 56-63 (1966); Keynes, A Treatise on Probability, 121, 135-136 (1952). Probative force and illegality are sufficiently

independent to justify multiplying them for the purposes of this analysis. Where the probability of one of two variables approaches 100% the product will, of course, approximate the probability of the less probable variable.

Applying this analysis to facts such as those in this case, it is surely possible that the jury in this case—which was not instructed separately that it was to ignore petitioner's confession if involuntary (see pp. 20-21, *infra*)—considered as critical evidence of petitioner's guilt a confession which the trial judge had found voluntary only by a bare preponderance of the evidence. If so, the constitutional safeguard against conviction of an innocent man has been breached.

Moreover, this Court's *Chapman* decision demonstrates that in the area of constitutional violations, great importance attaches to the degree of certainty with which it can be said that there was no infringement on an accused's constitutional rights. Just as the Court held in *Chapman* that the need for certainty warranted application of the reasonable doubt standard, that standard should be applied in determining whether there was a violation and whether evidence used by the prosecution was secured as a result of such violation.

B. The Reasonable-Doubt Standard Should Apply Here Because of the Devastating Effect of a Confession and the Importance of Protecting Against Compulsory Self-Incrimination.

The above argument proceeds on the premise that the same burden of proof applies to the preliminary determination made by a trial judge on factual questions relating to *all* alleged constitutional violations affecting the admissibility of evidence. In other words, it assumes that the factual findings underlying the voluntariness of a confession are to be treated in the same manner as findings relating to the reasonableness of a search or to the identification of an accused at a post-arrest lineup. Even assuming, however,

that the Court does not view all such fact determinations as requiring the same high standard of proof, we submit that at least when the voluntariness of a confession is at issue it is appropriate that proof beyond a reasonable doubt be required of the prosecution. And when, as is true under the Illinois procedure, the trial judge's conclusion as to admissibility is the final word on the question whether the confession was involuntary, that conclusion may not constitutionally be based on any lesser standard.

The constitutional rule forbidding introduction in evidence of an involuntary confession is based, as this Court has observed, on a "complex of values" (*Blackburn v. Alabama*, 361 U.S. 199 (1960)) which includes, in addition to the "feeling that the police must obey the law," the probable unreliability of an involuntary admission and the importance to our society of preserving the individual freedom of will secured by the Fifth Amendment's privilege against self-incrimination. *Ibid.* See also *Miranda v. Arizona*, 384 U.S. 436, 458-460 (1966). These additional "values" are endangered when an allegedly involuntary confession is sought to be used against an accused, and the issues presented for decision in such a case are, therefore, unlike those in situations where the sole basis for excluding evidence is that exclusion is a necessary prophylactic against impermissible police conduct.[8]

Moreover, an accused's confession—unlike real evidence subject to seizure—is likely to have great probative value on the ultimate factual question of guilt or innocence. As Lord Justice Devlin said in a statement quoted with approval in the opinion announcing the judgment of this Court in *Culombe v. Connecticut*, 367 U.S. 568, 576 (1961), "The least criticism of police methods of interroga-

[8] Indeed, in the landmark involuntary-confession decision of this Court—*Brown v. Mississippi*, 297 U.S. 278 (1936)—the "Exclusionary Rule" applicable to unconstitutional seizures announced more than twenty years earlier in *Weeks v. United States*, 232 U.S. 383 (1914), was not even cited.

tion deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused's own statement." Devlin, *The Criminal Prosecution in England* 58 (1958). Consequently, the question whether the confession was properly or improperly obtained is much more central to the ultimate issue of guilt or innocence than is true in the usual search-and-seizure case involving the Exclusionary Rule.

It is doubtless on account of this "complex of values" surrounding an accused's post-arrest statements that this Court found it necessary to impose "proper safeguards" on in-custody interrogation in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). While those "safeguards" insure that, on admitted facts regarding an arrest and interrogation, an accused will have the knowledge needed to decide whether or not to make a voluntary statement, they do not secure the integrity of the factfinding process. That result is most effectively achieved by bringing under the reasonable-doubt standard the factual issue whether the confession was voluntarily given.

This was essentially the reasoning of the Court of Appeals for the District of Columbia Circuit in *Pea v. United States*, 397 F.2d 627, 637 (1967). Following the square holding to the same effect by the Court of Appeals for the Fourth Circuit in *United States v. Inman*, 352 F.2d 954 (1965), and *Mullins v. United States*, 382 F.2d 258 (1967), and decisions of several other circuits implying that there is a higher standard in determinations concerning the voluntariness of a confession than in other fact questions affecting the admissibility of evidence,[9] the D.C. Cir-

[9] *E.g., United States v. Feinberg*, 383 F.2d 60, 70 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) (independent judicial determination); *Fisher v. United States*, 382 F.2d 31, 34 (5th Cir. 1967) ("clear cut determination" on the record); *Moser v. United States*, 381 F.2d

cuit held in an *en banc* decision that the prosecution was obliged to prove voluntariness of a confession beyond a reasonable doubt "as a sound implementation of the public interest in preventing involuntary confessions from playing any part in a jury's determination of guilt." 397 F.2d at 638. As explained in the concurring opinion in *Clifton v. United States*, 371 F.2d 354, 360 (D.C. Cir. 1966), adopted by the majority of the *en banc* court in *Pea*, this conclusion was mandated by "the distinctive nature of the voluntariness determination." 371 F.2d at 362. As the court explained, that determination "relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury." *Ibid.*

State courts have reached the same result. The Minnesota Supreme Court, for example, held in *State v. Keiser*, 274 Minn. 265, 143 N.W.2d 75 (1966):

> It should be conceded that in many instances the impact of a voluntary confession admitted in evidence is so devastating as to almost assure a verdict of guilty. Under such circumstances, the trial court takes an important part in making a fact determination. That being the case, it would seem to us that the evidence of voluntariness should be of such persuasive force as to satisfy the court to a moral certainty or beyond a reasonable doubt that a confession was voluntarily given.

See also *State v. Ragsdale*, 249 La. 420, 187 So.2d 427 (1966); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965); *State v. Longmore*, 178 Neb. 509, 139 N.W.2d 66 (1965). Compare *State v. Yough*, 49 N.J. 487, 231 A.2d 598 (1967), where the Supreme Court of New Jersey considered the issue and held that this Court's decision in *Jackson v. Denno, supra*, did not make the reasonable-doubt standard constitutionally applicable to past cases but warranted its use in the future.

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363 (9th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *Evans v. United States*, 375 F.2d 355, 360 (8th Cir. 1967) ("unmistakable clarity").

C. Unless the Reasonable-Doubt Standard is Applied, the Protection Afforded by Jackson v. Denno Works to the Disadvantage of an Accused.

Dissenting from the Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), Mr. Justice Black noted that the majority opinion had failed "to say anything about the burden of proving voluntariness" (378 U.S. at 404-405). He observed that if the Court's rule required only that voluntariness be established by a preponderance of the evidence, it "is a distinct disadvantage to the defendant" as compared with the New York practice found invalid. *Id.* at 405.

The majority opinion in *Jackson* quoted the instruction given the jury by the trial court—which contained no specific reference to any standard of proof—and observed that there had been no issue raised "as to whether these instructions stated an adequate and correct federal standard for determining the voluntariness of Jackson's confession." 378 U.S. at 375, n. 5. That issue is raised here, and we submit that the reasoning of *Jackson v. Denno* and the protection its rule sought to afford to criminal defendants requires its implementation with the reasonable-doubt standard.

A comparison of two respects in which the *Jackson v. Denno* procedure altered earlier New York law demonstrates the unsoundness, under the reasoning of that case, of permitting a trial judge to arrive at his conclusion on less than proof-beyond-a-reasonable-doubt:

First, under the former New York practice, the jury was instructed to disregard the confession unless it determined, beyond a reasonable doubt, that it had been voluntarily given. See *Stein v. New York*, 346 U.S. 156 at 173 n. 17 (1953). This was substantial protection for an accused whose version of post-arrest events differed from the testimony given by police officers and who could establish a reasonable doubt as to whether the officers were telling the truth. Because of the probability that a jury's consideration of guilt or innocence would affect its decision on voluntariness (and vice versa), the Court held that the procedure

posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined." 378 U.S. at 389.

Under the standard approved by the courts below, however, the right to have an involuntary confession "entirely disregarded" and to have the "coercion issue * * * reliably determined" is more diluted than it was by the New York procedure. For on a bare preponderance of the evidence, the petitioner's confession was launched for the jury to consider as it wished—without the careful scrutiny a higher standard would have required. Is it clear that criminal defendants face greater "hazards" (378 U.S. at 389) from the unitary New York system—which cautions the jury on the treacherousness of confessions and requires proof of voluntariness beyond a reasonable doubt before a confession may be considered at all—than from a two-phased proceeding in which the only restraint on the factfinder is whether it is more likely than not that a confession was voluntary? We submit that many criminal defendants would prefer, in these circumstances, the frying pan of the New York practice to the fire of a trial judge's finding of probabilities.

Second, the Court referred tangentially in *Jackson v. Denno*, 378 U.S. at 389, n. 16, to the dilemma in which the unitary New York practice placed the defendant who might wish to testify on the voluntariness of his confession but not be cross-examined on other issues and impeached by prior convictions. That "obstacle" is inadequately overcome if the trial judge, by making a finding on probabilities, can force the defendant to a similar choice—either permit the confession to go unchallenged or be subject to impeachment. If the protection afforded by *Jackson v. Denno* is to be made meaningful, no lower a standard than proof-beyond-a-reasonable-doubt should be required before the confession is submitted for the jury's scrutiny and for such rebuttal as the defendant feels called upon to make.

II. A CRIMINAL DEFENDANT IS CONSTITUTIONALLY ENTITLED TO A JURY DECISION ON THE FACTUAL ISSUE OF VOLUNTARINESS OF HIS CONFESSION.

Under established Illinois law, a defendant whose confession has been ruled voluntary by the trial judge may not challenge that issue before the jury; he is limited to attacking the weight and credibility of the confession. Particularly where the judge's decision is based only on a balance of probabilities—*i.e.*, where he may admit the confession if he determines that a bare preponderance of the evidence supports a conclusion of voluntariness—this foreclosure of a factual issue violates the Fourteenth Amendment.

The fundamental policy underlying the jury-trial guarantee of the Sixth Amendment, made applicable to the States by the Fourteenth Amendment and *Duncan v. Louisiana*, 391 U.S. 145 (1968), supports petitioner's position.[10] That constitutional right was designed to give an accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge." 391 U.S. at 156. Nowhere is this protection more important than with respect to allegations of governmental misconduct, and particularly overreaching in violation of the Fifth Amendment's privilege against self-incrimination. For if the final decision on whether to believe police officers who testify that a post-arrest confession was freely given or an accused who swears that it was coerced is withdrawn from "the common-sense judgment of a jury" and entrusted exclusively to "the more tutored but perhaps less sympathetic reaction of the single judge" (391 U.S. at 156) a basic safeguard against "unchecked power" (*ibid.*) in an area where it is most likely to be exercised has been removed.

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[10]We recognize, of course, that *Duncan* has only prospective effect. *DeStefano v. Woods*, 392 U.S. 631 (1968); *DeBacker v. Brainard*, 396 U.S. 28 (1969). However, we submit that the policies and rationale of the *Duncan* decision should apply to considerations such as those at issue here.

It is no answer to say that a jury which, notwithstanding the judge's finding, believes a confession to be involuntary will ignore it. If it is not specifically authorized to do so and if an accused's counsel may not argue to it, in summation, that an involuntary confession is entitled to no consideration whatever, the very "hazard" that this Court envisioned in *Jackson v. Denno* is likely to occur—*i.e.*, the jury will probably consider the confession truthful and base a conviction upon it, even while condemning the police conduct. 378 U.S. at 388.

We recognize that the Court's opinion in *Jackson v. Denno* describes a procedure whereby "the judge himself solely and finally determines the voluntariness of the confession" as "the orthodox rule." 378 U.S. at 378. But we note that in the Appendix to the majority opinion, as well as in Mr. Justice Black's dissent and the Appendices thereto, there is considerable uncertainty as to whether the rule applied in a considerable number of jurisdictions is the "orthodox rule" or the "Massachusetts rule" (under which the jury separately determines voluntariness). Moreover, all the cited cases antedated *Duncan v. Louisiana, supra,* which recognized the essential nature of juries as factfinders, as well as *In re Winship, supra,* which made the reasonable-doubt standard the proper one for all criminal proceedings.

We submit, in conclusion, that the Illinois practice—which vests exclusive factfinding authority in the trial judge and authorizes him to admit in evidence an accused's confession on a finding that it is more probably voluntary than not—is too riddled with constitutional infirmities to be sustained. Whether either of these deficiencies, standing alone, would be enough to invalidate the practice need not be decided in this case. But the combination renders the procedure too unreliable and inadequately secures the rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

CONCLUSION

In this case, as in *Jackson v. Denno, supra*, the trial court's finding was unreliable, and the petitioner is entitled to a proper determination of his claim. In addition, he is entitled to have the jury consider his contention and disregard the confession if it is not satisfied that it was voluntarily given. Accordingly, the judgment below should be reversed with instructions to issue the writ of habeas corpus unless the State chooses to try petitioner anew under proper procedures.

Respectfully submitted,

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APPENDIX A

(No. 37712.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. DON RICHARD LEGO, Plaintiff in Error.

Opinion filed January 21, 1965

* * * * *

MR. JUSTICE SOLFISBURG delivered the opinion of the court:

The defendant, Don Richard Lego, was indicted in the criminal court of Cook County on the charge of robbery. He was tried by a jury; found guilty and sentenced by the court to a term in the penitentiary of not less than 25 nor more than 50 years. He prosecutes this writ of error from that judgment.

Defendant complains that he was denied due process of law, contending that a question of insanity was raised and the trial court erred in not conducting a sanity hearing before a jury pursuant to statute.

The basis for defendant's objection is that on the day of trial the public defender informed the court that he had just been handed a note written and signed by the defendant, which stated as follows: "I feel I am not competent to stand trial due to the fact I suffer from blackout spells." The attorney for the defendant then moved the court for a Behavior Clinic examination. This motion was denied by the court.

Although there was no formal request for a sanity hearing and no suggestion of insanity as such, defendant argues on appeal that the note and motion for a Behavior Clinic examination was sufficient to require the court to conduct a sanity hearing and that failure to do so was a violation of due process.

The trial, adjudication, sentence or execution of a person charged with a criminal offense, while insane, is a violation

of due process of law. (*People v. Burson*, II Ill.2d 360; *People v. Reeves*, 412 Ill. 555; *People v. Maynard*, 347 Ill. 422.) This court has held that a formal petition for a sanity hearing is not necessary. The question of a defendant's sanity may be raised by oral suggestions of counsel during the trial, and if made in good faith, it becomes the duty of the court to conduct a hearing before a jury upon the issue, and the denial thereof is a violation of due process. (*People v. Burson*, II Ill.2d 360; *Brown v. People*, 8 Ill.2d 540.) A trial judge has a duty to impanel a jury to determine whether an accused is capable of understanding the nature of the charges against him and of co-operating with his counsel whenever facts that give rise to a *bona fide* doubt as to the defendant's sanity are brought to the attention of the trial court, either from observation of the defendant or from suggestion by counsel. *People v. Harper*, 31 Ill.2d 51; *People v. Richeson*, 24 Ill.2d 182; *People v. Burson*, 11 Ill.2d 360.

Counsel's motion for a Behavior Clinic examination alone was insufficient to raise a *bona fide* question as to the defendant's capacity to stand trial. (*People v. Harper*, 31 Ill.2d 51; *People v. Cleggett*, 22 Ill.2d 471). The question, therefore, is whether all the facts presented to the trial court were sufficient to raise a *bona fide* doubt as to the defendant's sanity.

At no time did counsel for the defendant state that the defendant was unable to co-operate with him or was unable to comprehend the nature of the charges against him. Defense counsel did not contend that there were any other factors bearing on defendant's competency; he merely read to the court a self-serving note written by the defendant. The defendant testified lucidly and at great length with myriad details during the trial. His conduct and testimony gave eeryv indication that he was thoroughly oriented, aware of the nature of the proceedings and gave intelligent co-operation to his counsel, both on the hearing of the motion to suppress the confession and during the jury trial

itself. In our opinion there were not sufficient facts presented to the trial court to raise a *bona fide* doubt as to the defendant's sanity and therefore the trial judge was not required to conduct a sanity hearing.

Prior to the trial on the merits the defendant made a motion to suppress an oral confession reduced to writing, contending that the confession was given as a result of coercion. After hearing, the court denied the motion and the defendant urges error in this ruling.

The law is clear that only voluntary confessions may be used as evidence against an accused and that confessions procured through force, threats or offers of leniency are inadmissible. However, the question of the voluntary character of a confession is for the trial court to determine, and unless it can be said that the decision of the trial court is manifestly against the weight of the evidence, the decision of the trial court will not be disturbed. *People v. Weger*, 25 Ill.2d 370; *People v. Miller*, 13 Ill.2d 84; *People v. Townsend*, 11 Ill.2d 30.

The defendant claims that his oral confession was coerced by reason of a beating by the police in the squad car as he was being taken to the station and by a further beating while handcuffed in a chair in the police station and by police threats in the station. Defendant's claims are unsubstantiated and categorically denied by all the witnesses offered by the prosecution. While the trial court's decision on the motion to suppress was not against the manifest weight of the evidence, defendant complains that the confession was wrongfully admitted into evidence because the prosecution failed to call all the witnesses thereto or to satisfactorily account for their absence.

This court has established the rule that the State is required to produce all material witnesses on the issue of voluntariness of a challenged confession and that all such witnesses must be produced or their absence satisfactorily explained. (*People v. Sims*, 21 Ill.2d 425.) This rule, however, applies only to material witness and it is not necessary to call all

persons who may have seen the defendant during his incarceration and who had nothing to do with his supervision or confession. *People v. DeSimone*, 27 Ill.2d 406, 410.

Defendant argues that it appears that a police magistrate, one Judge Robinson, was called to the police station and was present for most of the time the defendant was held there. It also appears that a 17 or 18-year-old boy was present at the time the defendant was arrested and taken to the police station. Neither Judge Robinson nor the boy testified and it is claimed that the motion to suppress should not have been denied as both were material witnesses.

It is undisputed that the defendant, a 29-year-old admitted ex-convict, entered the home of Raymond Termunde and accosted Termunde and his three children with a gun, announcing, "This is a stickup." He took ninety dollars from Termunde, and then shot him in a subsequent scuffle. Defendant was arrested by the police while still in the Termunde home.

The defendant at the trial, while continuing to claim police brutality, testified that he would have made the statement anyway. We conclude that the trial judge's ruling that the confession was voluntary was not against the manifest weight of the evidence.

Under these circumstances, while it may have been better practice for the State to have called Judge Robinson and the boy, we cannot say that the failure to do so denied defendant due process or prejudiced him in any way. *People v. Krans*, 395 Ill. 233.

Defendant also contends that certain statements of the trial judge deprived him of a fair and impartial trial. We have examined the record and find this claim is entirely unsubstantiated. The instances cited in defendant's brief cannot be said to have prejudiced him, or denied him the right to a fair trial.

Upon the entire record it appears that defendant received a fair trial. He was caught red-handed and the evidence of

his guilt was conclusive. We therefore affirm the judgment of the trial court.

Judgment affirmed.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Joseph F. SCHIPANI, Defendant.

No. 63 CR 237.

United States District Court
E.D. New York.
July 26, 1968.

* * * * *

OPINION AND ORDER

WEINSTEIN, District Judge.

* * * * *

II. APPLICABLE LAW

A. *Particular Items of Evidence*

1. *Is evidence to be excluded if it is obtained as a combined result of tainted and untainted leads?*

[1] The test laid down in *Silverthorne* is that evidence is admitted if it is obtained from an untainted "independent source" but excluded if it is obtained as the result of illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In the case before us a more appropriate simile than the "fruit of the poisonous tree" (Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)), is, perhaps, that of a tree nourished by both pure and polluted waters. In this circuit the tendency has been to find any appreciable pollution sufficient to taint the fruit. See United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962).

[2] If the evidence is discovered as a result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have sufficed to uncover the evidence. As the Court of Appeals for this cir-

cuit declared, it is not sufficient for the government to show that "in the normal course of events it might have discovered the questioned evidence without an illegal search":

> "a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities." United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962).

See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 624-30 (1968) ("The logic of the 'inevitable discovery' . . . collides with the fundamental purpose of the exclusionary rule"); Note, Fruit of the Poisonous Tree Doctrine—A plea for Relevant Criteria, 115 U. of Pa. L. Rev. 1136, 1143 (1967) (defendant need not show that police "would not have discovered the challenged evidence 'but for' the illegal police conduct").

2. *What is the burden of proof?*

(a) *Common Law Rule*

[3] Once it becomes apparent that the issue is in the case (Maguire, Evidence of Guilt, 221 (1959)), the government bears the burden of convincing the court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights.

There is lack of agreement about the weight of this burden. Some have suggested that it is by a preponderance. Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354, 358-359 (1966), cert. denied, 386 U.S. 995, 87 S. Ct. 1312, 18 L.Ed.2d 341 (1967) (confession). Others use a variant of the phrase "clear and convincing evidence."

United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed.2d 716 (1963) (consent to search must be "proven by clear and positive evidence"); Fisher v. United States, 382 F.2d 31, 34 (5th Cir. 1967) (confession; "clear cut determination"); Evans v. United States, 375 F.2d 355, 360 (8th Cir. 1967), rev'd on other grounds sub nom. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (confession); United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962) (consent to search; "clear and positive testimony"); cf. United States v. Wade, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed. 2d 1149 (1967) (government could "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect" other than those made at the prior identification; reasons for standard not discussed). Still others have declared that "proof beyond a reasonable doubt" is required. Mullins v. United States, 382 F.2d 258, 261 (4th Cir. 1967) (confession); United v. Inman, 352 F.2d 954, 956 (4th Cir. 1965) (confession); Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354, 360-364 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967) (concurring opinion) (confession); Pea v. United States, 397 F.2d 627, 633, n. 7 (D.C. Cir. 1968), (collecting cases in other jurisdictions; confession); United States v. Taglianetti, 274 F. Supp. 220, 226 (D.R.I. 1967) (electronic surveillance). Cf. Gillison v. United States, 399 F.2d 586, 588 (D.C. Cir. July 2, 1968) (state must show that line of questioning was harmless beyond reasonable doubt); United States v. Feinberg, 383 F.2d 60, 70, n. 10 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968) (citing New York standard of beyond a reasonable doubt in confession cases); People v. Johnson, 68 Cal. Rptr. 599, 609, 441 P.2d 111, 121 (May 28, 1968) (state must show beyond reasonable doubt that erroneous admission of prior inconsistent statement constituted harmless error). Mathes and Devitt, Federal Jury Practice and Instructions, §8.16 (1965) (jury to be instructed

not to use confession unless satisfied beyond a reasonable doubt that it was voluntary). Finally, there are opinions eschewing the opportunity to fix a standard. See, e.g., Jackson v. Denno, 378 U.S. 368, 405, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964) (dissent) (question of weight of burden in confession cases left open); Pea v. United States, 397 F.2d 627, 639 (D.C. Cir. 1968) (dissent) (Supreme Court's refusal "to come to grips with problem"; others "have avoided the problem"); cf. United States v. Jordan, 399 F.2d 610, 614 (2d Cir. July 30, 1968) ("government had a heavy burden of proving voluntary consent" to search); Carlo v. United States, 286 F.2d 841, 848 (2d Cir.), cert. denied, 366 U.S. 944, 81 S.Ct. 1672, 6 L.Ed.2d 855 (1961) (search and seiaure; "quantum of proof * * * not that required on a trial of the issue of guilt or innocence").

In the case before us, the precise weight of the government's burden may affect the decision on the motion to suppress. We are, therefore, compelled to address the question with some attention. The matter presents inherent practical and theoretical difficulties.

The problem will, perhaps, be more clearly exposed by considering a number of simple hypothetical situations. (The terminology used generally follows Michael and Adler, The Trial of an Issue of Fact, 34 Colum. L. Rev. 1224, 1252 (1934) and Michael and Adler, The Nature of Judicial Proof (1931). See also, e.g., Ball, The Moment of Truth: Probability Theory and Standards of Proof, 14 Vand. L. Rev. 807 (1961); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941)).

[4] In a civil case involving a breach of contract where defendant claims that he did not execute the agreement, the court will admit the alleged written contract if a reasonable man might find that it was signed by or on behalf of the defendant. Admissibility depends purely on the document's meeting minimum standards of probative force. There may be mixed questions of law and fact relating to "execution" turning on whether, for example, the document was forged

or whether the defendant was tricked into signing it. In determining whether the material proposition—the defendant "entered" into the contract—has been established, the jury will consider all of the admitted evidence, including the document before it. If there is some doubt about whether the defendant's signature was forged, or whether he had authorized an agent to execute it, the jury will consider this doubt in evaluating all the lines of proof bearing on the material proposition.

The level of burden of proof (persuasion) with respect to the material proposition will be, since this is an ordinary civil case, a preponderance—that is to say the trier must be convinced, on the basis of his evaluation of the evidence, that the proposition is more probably true than false (50+% probable for purposes of this analysis). Thus, if the trier would have been just convinced that the material proposition was probably true absent this doubt about the authenticity of the document, doubt about this line of proof might sufficiently reduce his evaluation of the probability of the material proposition so that he might find that it was not proven (50% or less probable).

The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced (and often of that reasonably expected which was not produced). In giving appropriate, if sometimes unreflective, weight to a specific piece of evidence the trier will fit it into a shifting mosaic. If the trier concludes that one item of evidence is reliable, this may affect his evaluation of the credibility of a witness who gives testimony inconsistent with this evidence. His evaluation of the credibility of this witness may, in turn, affect his conclusion as to the probative force of the witness' testimony with respect to another line of proof. But confirming evidence of that other line of proof may require a reevaulation of the witness' credibility

and a complex readjustment of the assessment of all the interlocking evidence.

[5] Since so much of the evaluation of evidence depends upon varying hypotheses applied by triers with different backgrounds and views of life, fact finding differences among jurors and between judge and jury are to be expected. The court's function is, in the usual simple case, only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible. See Trautman, Logical or Legal Relevancy—A Conflict of Theory, 5 Vand. L. Rev. 385, 390 (1951). Even, therefore, if a juror decides that the probability is only 40% that the document referred to above is authentic, it may help him determine whether the material proposition is more probably true than not. This difference between the probabilities required of a material proposition and of relevant evidence and individual lines of proof partly explains why, in criminal cases, some courts have said that while the burden of proof of an element of the crime is beyond a reasonable doubt, individual items of evidence need not be proved by so high a standard. United States v. Valenti, 143 F.2d 362, 364 (2d Cir. 1943); People v. Klinkenberg, 90 Cal. App.2d 608, 204 P.2d 47, 62 (1948); 9 Wigmore, Evidence, § 2497, p. 324 (3d ed. 1940).

It is apparent, then, that the judge's function in determining admissibility in a case such as is hypothesized above is relatively simple. 9 Wigmore, Evidence § 2550 (3d ed. 1940); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, 86-105 (1956); Note, 59 Harv. L. Rev. 488-491 (1964); California Law Revision Commission, Recommendation Proposing an Evidence Code, 56-70 (1965). He need not be concerned unduly about mistakenly admitting evidence because, if the document lacks

probative force, the jury can (absent factors such as prejudice) be counted on to ignore it. Only time has been lost by admitting evidence with probative force so low that it cannot affect the outcome.

Where admissibility of evidence depends upon extrinsic policies rather than upon probative force, the problem is more complex and the pressure on the trial judge is greater. Let us suppose, solely for the sake of analysis, that the burden on the government is to prove by a preponderance that a proferred document with high probative force was not obtained in violation of the law. Assume that exclusion depends upon an extrinsic policy designed to protect constitutional rights and to discourage obtaining evidence illegally. Suppose that the only material proposition in the case is whether defendant had certain knowledge (as that the powder he possessed was a narcotic). Let us suppose that the only evidence on the point is a letter from the defendant and that it would permit a jury to find beyond a reasonable doubt (95+% probable, for the purposes of this analysis) that he did have knowledge.

Now, if we suppose that the judge has decided that there is a question about whether the document was illegally obtained but that there is a bare preponderance (50+% probable) in favor of the government's contention that it was legally obtained, the judge will, on the assumptions made, admit it. The question of whether the document was or was not illegally obtained is not considered by the jury and normally it will not have before it evidence bearing on this question. Thus, the jury will give the document its full probative weight and it will find the defendant guilty beyond a reasonable doubt.

Whether such a result in a criminal case is proper depends upon how the rule of law is stated. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by evidence properly admitted in the trial*" the verdict should stand. The trier might have concluded that the probability of knowledge was 95+% if he assessed the

document solely on the basis of its probative force.' However, if it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by legally obtained evidence*," there is doubt about the validity of the conviction. If the probative force is discounted by the probabilities relating to the illegality, then the total probative force of all the relevant evidence might well have fallen below 95+%. The documentary line of proof would not then have a force of 95+% probability but of (95+ x 50+) %, or somewhere in the order of 50+%. order of 50+%. See Ball, The Trial Court: Probability Theory and Jury Issues, in Communication Sciences and Law: Reflections from the Jurimetrics Conference, 189-90 (Allen and Caldwell, eds., 1965).

This attenuation of probabilities results from the fact that, where variables are independent and the probability of a combination of variables is to be determined, the probability of each variable is multiplied by the probability of each other variable. See, e.g., Hoel, Elementary Statistics, 56-63 (1966); Keynes, A Treatise on Probability, 121, 135-136 (1952). Probative force and illegality are sufficiently independent to justify multiplying them for the purposes of this analysis. Where the probability of one of two variables approaches 100% the product will, of course, approximate the probability of the less probable variable.

[6] Dicta of the Supreme Court, while not decisive, suggest that the rule of law is that a defendant must be proved guilty beyond a reasonable doubt by legally obtained evidence. See, e.g., Lynumn v. State of Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958); cf., Mesarosh v. United States, 352 U.S. 1, 9, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956). For example, in Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975 (1958), the Court noted that it:

> "has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the

> admission in evidence * * * of the coerced confession vitiates the judgment * * *."

Cf. Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (search and seizure; "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). Since even the slightest possibility that illegally obtained evidence was used vitiates a conviction, a very effective procedural screen must be interposed.

Most of the cases dealing with burdens of proof on admissibility have been confession cases and the issue has been unconstitutional "coercion." But it is hard to see why the issue of whether the police "coerced" a confession in violation of the constitution should be treated, for procedural purposes, any differently from that of whether they obtained evidence "as a result of" illegal electronic surveillance. Both words—"coercion" and "result"—have factual and legal content and a finding with respect to the fact component in each presents similar problems to the judge.

Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A "confession" may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend upon how critical the evidence sought to be suppressed may be at the trial. The judge is often unable to accurately predict at that stage whether a particular item of evidence will clinch the prosecution's case.

The fact that exclusion in "coercion" cases was historically based upon lack of probative force (Maguire, Evidence of Guilt, 108-109 (1959)) while exclusion of other kinds of illegal evidence has been based upon purely extrinsic policies (People v. Cahan, 44 Cal. 2d 434, 439, 442, 445-

449, 282 P.2d 905, 907, 909-914 (1955); Maguire, Evidence of Guilt, 167-169 (1959)), does not justify a higher burden in a confession case. In fact, as we have already seen, the probative force argument may be available to the jury where a confession is introduced, while it may not be if evidence obtained by illegal searches or surveillance is used. Cf., as analogous to confession cases, United States v. Davis, 399 F.2d 948, 950, n. 1 (2d Cir. July 17, 1968), (voir dire on identification procedures followed by evidence before jury on reliability of identification in court). There is, therefore, some possibility that the jury will discount a confession which is in fact not voluntary but almost none that it will ignore evidence obtained by illegal electronic surveillance, wiretaps or searches. More, rather than less, protection therefore seems called for in cases such as the one before us.

It is extrinsic policy considerations rather than lack of probative force that now explain many confession exclusion rulings. See, e.g., Spano v. People of the State of New York, 360 U.S. 315, 320-321, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); Jackson v. Denno, 378 U.S. 368, 386 n. 13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The policies are essentially the same in search and seizure, wiretapping and electronics eaves dropping cases. See, e.g., American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, 114-115 (1968). In each instance an important constitutional right of the defendant is being protected and the policy of deterring future lawlessness by officials is being applied. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." Mesarosh v. United States, 352 U.S. 1, 9, 77 S. Ct. 1, 5, 1 L. Ed. 2d 1 (1956).

[7] Confessions obtained as a result of violations of constitutional search and seizure requirements are, for that reason alone, inadmissible; "it matters not," Judge Fuld has properly instructed us, "that these 'fruits' happen to be

confessions rather than some other type of evidence." People v. Rodriguez, 11 N.Y.2d 279, 286, 229 N.Y.S.2d 353, 357, 183 N.E.2d 651, 654 (1962). It would make little sense if, as a result of a doubt about a single illegal search, the confession alleged to have been obtained were excluded and the seized real proof were admitted because the burdens were different. Simplicity and case in administration suggests the desirability of a single high standard in all suppression hearings. There is "no reasonable or logical basis for any distinction between inanimate (tangible) and animate (testimonial) evidence." People v. Dentine, 21 N.Y.2d 700, 703, 287 N.Y.S.2d 427, 429, 234 N.E.2d 462, 463 (1967) (Fuld, C.J. dissenting).

[8] A workable rule giving adequate consideration to the importance of the exclusionary policy is to require the government to prove beyond a reasonable doubt that the evidence it introduces was legally obtained. This is a familair standard in criminal cases. It is the one already utilized in some jurisdictions and adopted by the most recent appellate decision on the subject. See Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968) and see cases cited at pp. 54, 55, supra.

Application of this standard, based on observations in this Court, would not affect the government adversely in any significant number of cases. Most of the problems with respect to illegally obtained evidence in the federal courts are of an interim nature arising in large part from a lack of clear guidelines available to federal law enforcement personnel rather than to undisciplined lawlessness. As the legal standards become clearer and the procedures for insuring compliance more routinized, motions to suppress because of illegally obtained evidence will become less important than they are today. As a practical matter, even today at hearings on motions to suppress, there is often no serious dispute about the facts (see, e.g., United States v. Feinberg, 383 F.2d 60, 70 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S. Ct. 788, 19 L. Ed. 2d 836 (1968))—what

Justice Frankfurter has referred to as "the crude historical facts, the external 'phenonumenological' occurrences and events." Culombe v. Connecticut, 367 U.S. 568, 603, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037 (1961). Where there remains a reasonable doubt about what happened and whether the government acted lawfully, the evidence should be excluded.

We need not now decide whether this rule ought to apply to factual issues such as consent in search and seizure cases. Cf. United States v. Dawson, 400 F.2d 194 (2d Cir. August 12, 1968). The government's conduct has concededly been illegal, the information and evidence bearing on the factual questions now before us are peculiarly within its ken, and an important federal policy of protecting citizens against this sort of intrusion on their privacy is at stake. It is fitting that the government bear the burden of proof and that it be a high one. See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 647-48 (1968).

This decision with respect to burdens of proof in suppression cases is consistent with "the high standards which past decisions have insisted be maintained in the conduct of *federal criminal trials*." Lawn v. United States, 355 U.S. 339, 365, 78 S. Ct. 311, 326, 2 L. Ed. 2d 321 (1958) (concurring opinion) (emphasis supplied). Mesarosh v. United States, 352 U.S. 1, 3, 77 S. Ct. 1, 2, 1 L. Ed. 2d 1 (1956) ("the decision herein passes only on the integrity of the criminal trial in the federal courts"). Whether the Constitution requires that the same rule be applied by the states is not a matter we need now consider. Cf. Chapman v. State of California, 386 U.S. 18, 43, n. 2, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

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APPENDIX C

Emanuel PEA, Jr., Appellant,
v.
UNITED STATES of America,
Appellee.
No. 20433.

United States Court of Appeals
District of Columbia Circuit.

Argued April 18, 1967.

Decided Dec. 20, 1967.

Reargued En Banc Jan. 17, 1968.

On Rehearing En Banc June 19, 1968.

* * * * *

Before BAZELON, Chief Judge, and DANAHER, BURGER, WRIGHT, McGOWAN, TAMM, LEVENTHAL and ROBINSON, Circuit Judges, sitting en banc.

LEVENTHAL, Circuit Judge:

On December 20, 1967, a division of this court found error in the District Court's determination (made at 1966 Jackson v. Denno[1] hearing held pursuant to the Supreme Court's mandate),[2] that appellant's confession was voluntary. The division went on to rule that "it cannot fairly be found beyond a reasonable doubt that the confession was voluntary * * * [and] if that is the appropriate standard * * * a new trial must be held without introducing the confession in evidence." En banc hearing was ordered by a majority of the active judges on their own motion to decide whether the reasonable doubt standard is the appropriate one.

[7] In Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354 (1966), cert denied, 386 U.S. 995, 87 S.Ct.

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[1] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[2] 378 U.S. 571, 84 S.Ct. 1 (1964).

1312, 18 L.Ed.2d 341 (1967), the court rejected the contention that in order to be admissible in evidence a confession must be found by the trial judge to be voluntary beyond a reasonable doubt. We overrule that pronouncement and, in the exercise of our supervisory power over the administration of federal criminal justice in the District of Columbia,[3] adopt the rule that a judicial determination that a confession is admissible cannot be made unless the judge is satisfied beyond a reasonable doubt that the confession was voluntary.[4]

[8] The reasons which support our adoption of this rule have been set forth elsewhere,[5] and it is unnecessary to dwell upon them. Normally, we recognize, courts are chary of imposing upon trial judges the burden of applying quantitative standards in determining whether proffered evidence is admissible. But there are some places in the law of evidence, outside the domain of confessions, where it has been thought appropriate that a trial judge should follow such an

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[3]Cf. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382, 166 A.L.R. 1176 (1946); Tate v. United States, 123 U.S.App.D.C. 261, 359 F.2d 245 (1966).

[4]Whether this standard is also a constitutional requirement is now and may remain an academic question. Even a petition under 28 U.S.C. § 2255 could raise the question only by making a claim that prior to today's decision the judge admitted a confession in evidence notwithstanding his reasonable doubt of voluntariness. There may not be any such cases. Any such § 2255 petition would be referred to the trial judge who admitted the confession in evidence (unless deceased or unavailable) and he would be in a position to clarify the matter.

[5]*See* Clifton v. United States, 125 U.S. App.D.C. 257, 263, 371 F.2d 354, 360 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967) (concurring opinion); United States v. Inman, 352 F.2d 954 (4th Cir. 1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967). The concurring *Clifton* opinion was also based, in the alternative, on constitutional grounds, and so perhaps was *Inman*, but it is not necessary to resolve the constitutional question in this case. *See* note 4 *supra*.

approach.[6] Trial judges have certainly been required by a number of courts to determine voluntariness of a confession beyond a reasonable doubt[7] as a necessary aspect of determining admissibility in evidence. We concur in that rule as a sound implementation of the public interest in preventing involuntary confessions from playing any part in a jury's determination of guilt.[8]

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[6]*E. g.*, Newton v. Richmond, 198 Va. 869, 96 S.E.2d 775 (1957) (blood test evidence in drunk driving prosecution); Hardeman v. State, 216 Miss. 115, 61 So.2d 797, 802 (1953) (dying declaration); Tucker v. State, Nev., 412 P.2d 970 (1966) (evidence of prior crime); *see generally* State v. Yough, *supra* note 5 and materials cited therein.

[7]Mullins v. United States, 382 F.2d 258 (4th Cir. 1967), reaffirming United States v. Inman, 352 F.2d 954 (4th Cir. 1965); Fernandez v. Beto, 3 Cr.L.Rep. 2005 (U.S.Dist.Ct., N.D.Tex. March 6, 1968); State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966), cert. denied, 385 U.S. 1029, 87 S.Ct. 758, 17 L.Ed.2d 676 (1967); State v. Keiser, 274 Minn. 265, 143 N.W.2d 75 (1966); Lee v. State, 236 Miss. 716 112 So.2d 254 (1959); State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967); People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed.2d 1039 (1966). See also United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968); Williams v. Beto, 386 F.2d 16 (5th Cir. 1967). In *Feinberg*, the court upheld a finding of voluntariness when there was no "credible possibility that his written statement * * * had been unconstitutionally coerced," language denoting compliance with a reasonable doubt standard. 383 F.2d at 70. The court took occasion to detail the procedure prescribed by *Inman*, including the reasonable doubt standard, and to note that this was essentially the same as the New York procedure, without even hinting that it found the reasonable doubt standard questionable. 383 F.2d at 70 n. 10. In *Williams*, the court also referred with favor to the New York procedure including the requirement that the confession must be found voluntary by the court beyond a reasonable doubt. 386 F.2d at 18 n. 2.

[8]Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (U.S. May 20, 1968); Pinto v. Pierce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967) (per curiam); Sims v. State of Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Appellant's case is here on direct appeal. The judgment is reversed and remanded with the instruction that appellant's confession not be admitted in a new trial.

So ordered.

BURGER, Circuit Judge, with whom DANAHER, and TAMM, Circuit Judges join, dissenting:

I dissent for the reason stated in my opinion in Clifton v. United States, 125 U.S.App.D.C. 257, 371 F.2d 354 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967), which, notwithstanding Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the majority now overrides with respect to the standard of proof governing the trial judge's preliminary determination of voluntariness of a confession. There is no need to go beyond anything that was said in *Clifton* except to offer some general observations.

First, *Jackson* does no more than call for a procedure that will insure a "*reliable* determination on the voluntariness issue * * *." *Id.* 378 U.S. at 387, 84 S.Ct. at 1786 (emphasis added). The Court stopped there in the face of Mr. Justice Black's astringent dissent to the effect that the court failed to define the burden of proof by which the trial judge must initially determine voluntariness out of the jury's presence. *Id.* at 404–405, 84 S.Ct. 1774. Thus neither in *Jackson* nor in more recent confession cases has the Supreme Court made any effort to spell out a standard as absolute as the one now adopted. One might well consider that the Supreme Court *sub silentio* decided *against* adopting the reasonable doubt standard by its own refusal to come to grips with the problem. Yet this court now—without waiting for a body of experience to develop under *Jackson*—elects to rush into an area the Supreme Court only four years ago deliberately avoided. It could have done this only because it was not prepared to prescribed a standard for admissibility of evidence which is barren of support in either logic or experience and for which there is not even a hint of demonstrated need.

It is indeed a remarkable anomaly in the law that a trial judge, in passing on the *admissibility* of a piece of evidence, do so by any particular quantitative standard. Why is it not sufficient that the trial judge be convinced that jurors could reasonably conclude the confession voluntary beyond a reasonable doubt? The jurors, not the judge, are the ultimate triers under our system. This is an elementary rule on the admissibility of an infinite variety of evidence and has been so for centuries.[1]

No other federal appellate court, with the single exception of one,[2] has imposed the reasonable doubt standard in this context. All others have either avoided the problem entirely,[3] or established some qualitative standard consistent with sound judicial experience and far less stringent than what we now adopt.[4]

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[1] It is true, as the majority points out in note 6, that there are some rare instances where a quantitative standard has been imposed in passing on admissibility, such as dying declarations, but I suggest these cases do not reflect a majority rule, as was pointed out in State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967). Moreover, I suggest that the majority say just how many "dying declarations" cases this court has had in the last one hundred years. To rely on that gossamer strand to support a rule of law is a confession of the utter bankruptcy of the concept the majority now adopts.

[2] Mullins v. United States, 382 F.2d 258 (4th Cir. 1967); United States v. Inman, 352 F.2d 954 (4th Cir. 1965).

[3] Kristiansand v. United States, 384 F.2d 301 (5th Cir. 1967); United States v. Taylor, 374 F.2d 753 (7th Cir. 1967) (citing *Inman*, however); Wakaksan v. United States, 367 F.2d 639 (8th Cir. 1966), cert. denied, 386 U.S. 994, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967). The opinions in these cases, however, do not suggest whether the issue was raised or briefed.

[4] United States v. Feinberg, 383 F.2d 60, 70 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968) (independent judicial determination); Fisher v. United States, 382 F.2d 31, 34 (5th Cir. 1967) ("clear cut determination" on the record); Moser v. United States, 381 F.2d 363 (9th Cir. 1967), cert. denied, 389 U.S. 1054, 88 S.Ct. 802, 19 L.Ed.2d 850 (1968); Evans v. United States, 375 F.2d 355, 360 (8th Cir. 1967) ("unmistakable clarity"). In *Fein-*

The use of our supervisory powers to impose this unique and unwarranted burden of proof is a misconception of the purposes of our supervisory powers. As we noted in *Clifton*

> [i]n the future trial judges will be evaluating only those utterances of an accused which have already passed through the whole gamut of screening processes outlined in *McNabb*, *Mallory*, *Escobedo*, *Massiah*, and *Miranda*. The prospects now are that trial judges, otherwise much overburdened, will not be overworked in passing on the voluntariness of the few confessions which will survive the application of these cases.

125 U.S.App.D.C. at 263, 371 F.2d at 360. Our extraordinary supervisory powers should be exercised only for overriding need, and in such cases we should not be concerned too much if we find we must break with tradition. But here, with the number of usable confessions dwindling to the vanishing point, the need is not present, let alone overriding. But in those few remaining cases to which it will apply, the consequences will be to make convictions of the obviously guilty yet more difficult to secure even when the accused has fully described the details of his criminal act in a confession which is capable of satisfying twelve jurors, beyond reasonable doubt, as to voluntariness. We now hold that one judge must usurp the historic role of the twelve jurors.

This case is but another manifestation in this court of a tendency—happily not widespread in appellate courts—to follow the Jerome Frank syndrome—a school of thought which profoundly mistrusts juries,[5] and prefers fact finding by one judge whose conclusions can more readily be upset by appellate judges.

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berg and Williams v. Beto, 386 F.2d 16, 18 n. 2 (5th Cir. 1967), the court did refer to the New York procedure in which the trial judge makes a preliminary determination of voluntariness using the reasonable doubt standard.

[5] J. FRANK, COURTS ON TRIAL 108-145 (1949).

Since the Constitutional mandate for twelve jurors is explicit and cannot be directly evaded, this mistrust manifests itself in gradually chipping away at the jury function, requiring constantly increasing arrays of special instructions to fence in their discretion and multiple pretrial processes to restrict what jurors can safely be allowed to see and hear.

I think it is fair to say, again, that this is probably in part, at least, what Mr. Justice Black must have had in mind when in *Jackson* he pointedly said:

> Finally, and even more important, the Court's new constitutional doctrine [Jackson v. Denno] is, it seems to me, a strange one when we consider that both the United States Constitution and the New York Constitution (Art. 1, § 2) establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties. The reasons given by the Court for this downgrading of trial by jury appear to me to challenge the soundness of the Founders' great faith in jury trials. Implicit in these constitutional requirements of jury trial is a belief that juries can be trusted to decide factual issues. Stating the obvious fact that "it is only a *reliable* determination on the voluntariness issue which satisfies the constitutional rights of the defendant * * *," *ante*, p. 1786 (emphasis supplied), the Court concludes, however, that a jury's finding on this question is tainted by inherent unreliability. In making this judgment about the unreliability of juries, the Court, I believe, *overlooks* the fact that the Constitution itself long ago made the decision that juries *are* to be trusted.

378 U.S. at 405, 84 S.Ct. at 1796 (Black, J., dissenting).

I consider that juries are to be trusted as much when they return verdicts of guilty as when they set an accused free. Jurors do not need judges to act *in loco parentis*.

APPENDIX D

Nathaniel CLIFTON, Appellant,

v.

UNITED STATES of America,

Appellee.

No. 19757.

United States Court of Appeals
District of Columbia Circuit.

Argued May 11, 1966.

Decided Nov. 15; 1966.

Certiorari Denied April 10, 1967.

See 87 S.Ct. 1312.

* * * * *

BURGER, Circuit Judge:

This appeal arises out of the holding of the Supreme Court in Jackson v. Denno, 378 U. S. 368, 84 S.Ct. 1774; 12 L.Ed. 2d 908 (1964).

[1-5] More than 20 years ago Appellant was tried and convicted on a charge of robbery.[1] No appeal was taken. In 1964 Appellant first attacked his 1946 conviction by a petition in the District Court, Clifton v. United States, Civil No. 2316-64, which was treated by the court as a petition for a writ of *coram nobis*.[2] That petition was denied. Follow-

[1]Crim. No. 76574, April 5, 1946.

[2]Since Appellant has already served his sentence under the 1946 conviction which he seeks to collaterally attack, the attack would ordinarily be moot, *e.g.*, Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed. 2d 963 (1960). Moreover, since Appellant is currently serving a sentence under a New York state conviction, the normal vehicle for collateral attack, 28 U.S.C. §2255 (1964), in unavailable, Helfin v. United States, 358 U.S. 415, 418, 79 S.Ct. 451, 3 L.Ed. 2d 407 (1959); Farnsworth v. United States, 91 U.S.App.D.C. 121, 198 F.2d 600 (1952), cert. denied, 344 U.S. 915; 73 S.Ct. 338, 97 L.Ed. 706 (1953). However, his 1946 conviction was relied upon in New York where he

ing Jackson v. Denno, *supra*, a second petition was filed in 1965. In this second petition from which the instant appeal is taken Appellant rests on the single ground that the District Court in the 1946 trial had not afforded him an independent hearing such as is now required to pass on the voluntariness of the confession which was admitted in evidence against him.[3]

Search for the stenographic verbatim record of the 1946 trial was unavailing but the District Judge who presided at that trial heard Appellant's petition and relied on detailed personal longhand notes of the trial which he had preserved. On the basis of these notes the District Judge made findings that he had in fact conducted an independent hearing on the issue of voluntariness of the confession and "found on the basis of the evidence that the confession was voluntary * * * and admitted the confession." Accordingly, the District

was sentenced under a multiple offender statute. It is claimed that he will not be subject to a lawful sentence as a multiple offender if the 1946 judgment of conviction in this jurisdiction cannot stand. Where a practical effect on a present sentence may result from a successful attack on a conviction and sentence already served, the proper remedy is a writ in the nature of *coram nobis*, United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. (1954). Both the District Court and the Government assume that a petition for a writ in the nature of *coram nobis* is the proper remedy in this case.

[3] Appellant has made two other contentions for the first time on appeal. One allegation is that the confession evidence was obtained in violation of Federal Rule of Criminal Procedure 5(a). Such claims are not cognizable in a *coram nobis* proceeding, *e.g.*, Moon v. United States, 106 U.S.App.D.C. 301, 303, 272 F.2d 530, 532 (1959); *cf.* Thornton v. United States, 125 U.S.App.D.C. ____, 368 F.2d 822 (1966); Plummer v. United States, 104 U.S.App.D.C. 211, 212, 260 F. 2d 729, 730 (1958). Appellant's other argument is that his confession was obtained in violation of the rule articulated in Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964). In addition to the fact that this was not raised in the District Court and is untimely, the Supreme Court has recently ruled that *Escobedo* need not be given retroactive effect. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966).

Judge denied the contemporaneous petition, United States v. Clifton, 239 F. Supp. 49, 51 (D.D.C. 1965).[4]

The question to be resolved is whether the procedures applied in the 1946 trial and the instructions to the jury were "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession * * *," Jackson v. Denno, *supra*, 378 U.S. at 391, 84 S.Ct. at 1788.

The Government's position is that the District Judge who tried the case in 1946 made findings on the basis of his 1946 longhand notes, that he conducted an independent hearing on voluntariness out of the presence of the jury before deciding to submit that issue to the jury, and that this procedure, generally conforming to the so-called Massachusetts procedure approved in *Jackson*, fully satisfied the requirements of *Jackson*.

[6] Appellant contends that the Court in *Jackson* expressed doubts as to the procedure in this jurisdiction.[5] He

[4]The Government concedes the retroactive application of *Jackson*. We also note that *Jackson* has been listed by the Supreme Court itself as one of the new constitutional rules to be applied retroactively, Johnson v. State of New Jersey, 384 U.S. 719, 726-729, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Linkletter v. Walker, 381 U.S. 618, 628-629 n. 13, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965). The Court has also remanded cases concluded prior to *Jackson* for proceedings consistent therewith, indicating retroactive application. See Boles v. Stevenson, 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed. 2d 109 (1964); McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed. 2d 1041 (1964). See also Com. ex rel. Butler v. Rundle, 416 Pa. 321, 326, 206 A.2d 283, 286 (1965) ("the most persuasive authority for the proposition that the principle of Jackson v. Denno is to be applied to convictions finalized prior to the date of that decision in *Jackson* itself").

[5]The Court's Appendix to *Jackson* referred to the procedure in the District of Columbia as follows:

> The Court of Appeals for the District of Columbia, however, does seem to sanction a variation of the New York practice with the requirement that the judge hold a full preliminary hearing, at which the defendant may testify, outside the presence of the jury. It is not clear what the trial judge must find before admitting the issue of voluntariness to the jury. Sawyer

thus argues that "by stating that he [the District Judge] followed the 'traditional practice' in this district, the court * * * has virtually conceded that the procedures utilized in determining the voluntariness of appellant's confession do not meet the constitutional criteria laid down in *Jackson*." We do not agree. Doubts as to past practice do not necessarily mean that the requirements of *Jackson* were not met in Appellant's case. See Mitchell v. Stephens, 353 F.2d 129, 142 (8th Cir. 1965).

The critical issue raised by Appellant is that "the decision in Jackson v. Denno * * * requires that the trial judge, in addition to holding a preliminary hearing out of the presence of the jury, make a specific finding that the confession was voluntary beyond a reasonable doubt." Appellant also contends that the District Court did not instruct the jury that it was required to find the confession voluntary beyond a reasonable doubt in order to rely on it. The fact is that the Supreme Court did not pass on either of these questions in *Jackson*.

[7] Jackson v. Denno requires only that the procedures applied in these circumstances must be "fully adequate to

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v. United States, 112 U.S.App.D.C. 381, 303 F.2d 392; Wright v. United States, 102 U.S.App.D.C. 36, 250 F.2d 4 (where the confession could be found voluntary, the issue is for the jury). 378 U.S. at 400, 84 S.Ct. at 1793. On the same day the Court vacated and remanded two cases from this jurisdiction, Pea v. United States, 116 U.S.App.D.C. 410, 324 F.2d 442 (1963) and Muschette v. United States, 116 U.S.App.D.C. 239, 322 F.2d 989 (1963) for proceedings in conformity with *Jackson*, 378 U.S. at 569 and 571, 84 S.Ct. at 1927 and 1929, 12 L.Ed. 2d 1039 and 1040.

Since that time we have had numerous occasions to interpret the practice in this jurisdiction in light of *Jackson's* requirements and to resolve the doubts expressed therein. See Hutcherson v. United States, 112 U.S.App.D.C. 51, 351 F.2d 748 (1965); Green v. United States, 122 U.S.App.D.C. 33, 351 F.2d 198 (1965); Butler v. United States, 122 U.S.App.D.C. 5, 350 F.2d 788 (1965); Curtis v. United States, 121 U.S.App.D.C. 283, 349 F.2d 718 (1965); Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965).

insure a reliable and clear-cut determination of the voluntariness of the confession," 378 U.S. at 391, 84 S.Ct. at 1788; it made no attempt to define the standard to be applied by the trial judge in his preliminary determination of voluntariness,[6] and the Court expressly disclaimed any ruling on jury instructions concerning the consideration of voluntariness, 378 U.S. at 375 n. 5, 84 S.Ct. at 1779.

In his charge to the jury in the 1946 trial, the District Judge did not specifically single out the confession, apart from the other evidence, and define the standard applicable to it. We note, however, that the confession was in fact the essence of the Government's case. The Judge instructed the jury that the Government had the burden of proving beyond a reasonable doubt that the defendant was guilty and had committed every element of the offense charged. It does not seem possible to us that the jury would have failed to understand that in order to convict they must believe beyond a reasonable doubt both its voluntariness and its substance, *i.e.*, the truth of the facts recited in the confession.

[8] The District Judge, however, did not in 1946 or in the hearing from which this appeal is taken, spell out by what standard *he* evaluated the confession before submitting it to the jury. We are not unmindful that the Fourth Circuit has held that the District Judge must find the confession voluntary beyond a reasonable doubt when making his preliminary determination. United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965).[7] The opinion of that court contains no

[6] In the subsequent case of Boles v. Stevenson, 379 U.S. 43, S.Ct. 174, 13 L.Ed. 2d 109 (1964), the Court again did not articulate a standard other than to repeat the language of *Jackson* that a "reliable and clear-cut determination of the voluntariness of the confession" is required.. 379 U.S. at 45, 85 S.Ct. at 176. See also Kinder v. Boles, 253 F.Supp. 817, 823 (N.D.W.Va.1966).

[7] See also State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965); State v. Brewton, 238 Or. 590, 605, 395 P.2d 874, 881 (1965) (concurring opinion of O'Connell, J.). More recently courts which follow the orthodox view in which only the trial judge passes on

extended discussion or treatment of the vexing problem left unresolved by *Jackson*. The determination of whether a confession is voluntary is, in substance, a ruling on its admissibility as evidence. State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 249, 133 N.W. 2d 753, 762 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed. 2d 1039 (1966); State v. Keller, 240 Or. 442, 448, 402 P.2d 521, 525 (1965). Nowhere in the law—civil or criminal—has it ever been thought that a trial judge, in passing on admissibility of evidence in a jury case, must use the reasonable doubt standard.[8] The Supreme Court in *Jackson* pointedly failed to make any comment on this crucial issue, as Mr. Justice Black sharply noted in his dissenting opinion, 378 U.S. at 404-405, 84 S.Ct. at 1795-1796.

[9] It is one thing to call for this high standard of proof from the ultimate fact finders and quite another to ask that this issue be resolved preliminarily by the judge beyond a reasonable doubt contrary to all the law governing admissi-

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the voluntariness of the confession have opted for the reasonable doubt standard, *e.g.*, State v. Keiser, 274 Minn. 265, 143 N.W. 2d 75 (1966). These latter cases are the natural result of the rule that the trier of facts find guilt beyond a reasonable doubt. Under the orthodox view only the trial judge passes on the question of voluntariness of the confession. Under our procedure the trial judge and, if he finds the confession voluntary, the jury are permitted to do so, and since the jury is bound by the reasonable doubt standard, the logic of those cases requiring the trial judge to use the same standard at his preliminary determination is not compelling.

[8] *E.g.*, Carlo v. United States, 286 F.2d 841, 848 (2d Cir. 1961) (quantum of proof to be adduced on a summary proceeding to suppress evidence is not that required on trial of the issue of guilt or innocence); *cf.* Brinegar v. United States, 338 U.S. 160, 172-173, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (no requirement that proof sufficient to establish guilt is required to substantiate existence of probable cause); Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208, 217, 23 S.Ct. 294, 47 L.Ed. 446 (1903) (judge should require prima facie proof only of existence of common design for admission of declaration of one party to alleged conspiracy); Shafer v. State, 214 Tenn. 416, 381 S.W. 2d 254 (1964) (procedure for confessions is the same as in passing on admissibility of a search and seizure claim).

bility of evidence. We think Mr. Justice Black was correct in suggesting that to vest this essentially fact finding function in the judge would constitute a "downgrading of trial by jury," 378 U.S. at 405, 84 S.Ct. at 1796 (dissenting opinion). We are not persuaded that it is more logical or reasonable that a confession, alone among all the myriad of evidentiary material, be singled out for a unique standard of appraisal. It would be difficult to distinguish, so far as jury impact is concerned, the weight of a confession from other forms of damaging utterance—inconsistent statements and admissions, for example, heard by persons other than the police. *Cf.* Ashcraft v. State of Tennessee, 327 U.S. 274, 66 S.Ct. 544, 90 L.Ed. 667 (1946).[9] Under the Massachusetts procedure we see no basis for a special and unique "admissibility" standard which places the judge in the temporary role of a "juror," denigrating the historic fact finding role of jurors.

The concurring opinion views Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), as the source of the strict "reasonable doubt" standard for trial judges in the preliminary determination of voluntariness required under *Jackson* for the so-called Massachusetts procedure. The pertinent language in *Bram* is as follows:

> The rule is * * * that, in order to render a statement admissible, the proof must be * * * sufficient to establish that the making of the statement was voluntary * * * , 168 U.S. at 549, 18 S.Ct. at 189.

* * * * *

[9] Indeed, the evidence of an eye witness is likely to be at least as damaging as a confession; but no one has suggested that a trial Judge must be satisfied beyond a reasonable doubt that the eye witness is truthful or that his testimony is voluntary. Resolution of the weight of such evidence is left for the jury.

It should also be noted that, in ruling on the admissibility of such highly incriminating evidence as a "bloody shirt" found in the possession of the accused, no test, qualitative or otherwise need be applied by the judge.

> Any doubt as to whether the confession was voluntary must be determined in favor of the accused * * *, 168 U.S. at 565, 18 S.Ct. at 195.

Judge Leventhal concedes that the most that can be said said for the "any doubt" language of *Bram* is that it was a "quantum of proof" reference, used in a quantitative sense. *Bram* does not establish a standard which marks off on a qualitative scale the degree of certainty which a trial judge must employ before letting the jury evaluate both voluntariness and accuracy of a confession.[10]

The only alternative interpretation of *Bram* is to say that "any doubt" as used there means that the slightest scintilla of qualitative doubt regarding voluntariness would require the trial judge to ban the confession from any jury determination of voluntariness under its obviously lesser "reasonable doubt" standard. This would go far beyond imposing a mere "reasonable doubt" standard on trial judges in their preliminary determination of voluntariness. Thus, if we are to read *Bram* literally we must conclude that it calls for an absolute "any doubt" qualitative standard, and no reason appears why this should re reduced arbitrarily to a "reasonable doubt" standard. The language in *Bram* is simply "any doubt" not "any reasonable doubt." This analysis seems clearly apparent from the very wording of the questioned sentence in the *Bram* opinion. That Court was simply saying that *doubt* must be determined in favor of the accused regarding voluntariness

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[10]Harrold v. Territory of Oklahoma, 169 F. 47 (8th Cir. 1909), is cited as clarifying the language of *Bram* to mean "beyond a reasonable doubt," *id.* at 53-54. However, Judge Walter Sanborn clearly stated that in that circuit at that time it was solely the function of the trial judge to pass upon the question of voluntariness:

> It was not the province of the jury to consider or determine that issue. It was the duty of the court alone to hear and decide it.

169 F. at 53. Assuredly, the ultimate trier of facts must be bound by a reasonable doubt standard. See note 7 *supra*.

of confessions.[11] It was not addressing itself to framing a standard.

Additionally some mention should be made of a troublesome contradiction in the position that it is from *Bram* that we draw the "reasonable doubt" standard to be utilized by the trial judge in his preliminary determination but that *Jackson's* requirement of voluntariness hearings by the trial judge need not be retroactively applied to govern cases where some pre-admission voluntariness hearing was in fact held. It is reasoned that the required standard, "beyond a reasonable doubt," is an *old* one, established by *Bram;* but its expression is considered to be *new* since *Jackson,* with respect to whether this standard should have retroactive application. Under the concurring interpretation, *Jackson* is retroactive only in its requirement for a preliminary determination of voluntariness by the trial judge. *Jackson,* it is reasoned, need not be retroactively applied when some judicial screening did take place, although imposing a less restricted standard of of doubtfulness. Yet it is this very standard which Judge Leventhal claims was established long ago by *Bram.* For these reasons we are unable to accept the concurring interpretation of *Bram* and *Jackson* with respect to the issue now before us.

[10-12] We repeat again that *Jackson* does no more than call for a procedure that will give a "reliable determination on the voluntariness issue * * *," 378 U.S. at 387, 84 S.Ct. at 1786; we reject the argument that a United States District Judge cannot make that "reliable determination" on conven-

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[11] Judge Leventhal finds further significance in the fact that *Bram* has been revitalized in *Escobedo*; *Malloy,* and *Miranda.* Yet *Bram* was never once cited in *Jackson,* where its relevance on the present issue resides, if it has relevance. *Jackson* expressly overruled Stein v. People of State of New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953). *Stein* had thoroughly discredited *Bram, id.* at 190-191 n. 34, 73 S.Ct. at 1095 (*Bram* "is not a rock on which to build constitutional doctrine."). If Judge Leventhal's interpretation of *Bram* is correct, certainly the Court in *Jackson,* well aware that it was overruling *Stein,* would have taken notice of that interpretation of *Bram,* and answered the very questions presented before us today.

tional admissibility criteria, leaving any resolution of reasonable doubt as to that evidence in its traditional province—the combined judgment of twelve jurors. We hold that the confession should not be admitted in evidence unless the trial judge makes a preliminary determination and an express finding that on all the evidence he is satisfied that the confession was voluntarily made.[12] We note that Judge Leventhal's opinion sees little difference between a standard that the District Judge be "satisfied" of voluntariness and that he be persuaded of that conclusion beyond a reasonable doubt. If the determination of the District Judge is to submit the confession to the jury, however, he should not indicate that he has made a preliminary decision that it was voluntarily made, but he should specifically instruct that they are not to give any weight to the confession unless *they*, as ultimate fact finders, are satisfied beyond a reasonable doubt on all the evidence that it was voluntarily given by the accused.

That a coordinate tribunal has reached a different conclusion, United States v. Inman, *supra*, has led us to ponder carefully on this problem. We are presented with one choice which seems to us to maintain the role of lay jurors in their historically high place and another which limits them to resolving only those fact issues which can be "safely" entrusted to their collective judgment. For a generation judicial trends have been to exclude from the jury all evidence thought to have been unfairly or improperly secured, and more recent hodlings place stringent limits on the use of any utterance by an accused. In the future trial judges will be evaluating only those utterances of an accused which have already passed through the whole gamut of screening processes outlined in *McNabb*, *Mallory*, *Escobedo*, *Massiah*, and *Miranda*. The prospects now are that trial judges, otherwise much overburdened, will not be

[12]Even an orthodox jurisdiction such as Illinois has specifically rejected the reasonable doubt standard, see People v. Golson, 32 Ill.2d 398, 207 N.E. 2d 68 (1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1951, 16 L.Ed. 2d 1026 (1966).

overworked in passing on the voluntariness of the few confessions which will survive the application of these cases. At the very least, it seems to us to be reasonable to continue functioning without departing from the traditional rule reaffirmed by this holding. The future experience of this and other circuits may indicate a different rule is desirable. Perhaps this is why the Supreme Court left these issues unresolved in the face of Mr. Justice Black's astringent comments—so that the ultimate solution could be based on experience rather than on prophecy.

The order of the District Court is,

Affirmed.

LEVENTHAL, Circuit Judge (concurring in result):

I have a different view from that of my brethren as to the rule appropriate in implementing Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), concerning the standard that properly governs the trial judge when making a determination as to the voluntariness of defendant's confession before permitting its presentation in evidence in a criminal case tried to a jury.

1. As to all cases tried subsequent to Jackson v. Denno, the standards and procedures that are applicable, in my view, are those stated in United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965), where Judge Bryan succinctly outlined the procedure prescribed for the district courts in our neighboring circuit:

> To assure the accused complete protection, the procedure should substantially be this. On proffer of the confession, even though there be no objection, the court should let the jury withdraw, and then take evidence upon the confession and its factual setting. On this voir dire the defendant may testify without prejudice to his privilege not to take the stand before the jury, but he may be examined or cross-examined only with regard to the origin and character of the confession, not upon his innocence or guilt. The court will thereupon inde-

pendently determine whether the confession is admissible.

In this determination the District Judge will evaluate the evidence to ascertain whether, after resolving any conflicts therein, it convinces him beyond a reasonable doubt that the confession was voluntary. Unless the judge is so persuaded, the confession may not be admitted. If, however, he is satisfied beyond a reasonable doubt of its voluntariness, he should explicitly make and include in the record a finding of that fact. [Emphasis added.]

* * * * *

Following the voir dire hearing, the trial will proceed with or without the confession, according to whether it was received or rejected. If admitted, the court should instruct the jury, whether requested or not, upon the law governing the use of a confession. Stevenson v. Boles, 331 F.2d 939 (4 Cir. 1964), aff'd per curiam, 379 U.S. 43, 85 S. Ct. 174, 13 L. Ed. 2d 109. Included would be a forthright caution that before giving any weight to the confession, the jury must be satisfied beyond a reasonable doubt that it had been made by the accused uninfluenced by promise of reward, threat of injury or diminution of his rights.

Applying a reasonable doubt standard would not be a strange or exotic task for a judge. Every time he tries a criminal case without a jury he must find all the elements of a crime established beyond a reasonable doubt. The determination by a judge of the voluntariness of a confession is so significant in the final assessment of guilt or innocence, and relates to such basic values in our system of jurisprudence, that it must be governed by the same standards as apply to the elements of the crime, and is not to be relegated to a lower plane on the ground that it is a mere ruling on a point of evidence.

We are not dealing with an ordinary ruling on evidence. The exclusion of confessions not shown to be voluntary inheres in the constitutional privilege against self-

incrimination. Bram v. United States, 168 U.S. 532, 542, 18 S. Ct. 183, 42 L. Ed. 568 (1897); Malloy v. Hogan, 378 U.S. 1, 6-7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Miranda v. State of Arizona, 384 U.S. 436, 461, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The historical root is the maxim *nemo tenetur seipsum accusare*, "no one shall be held to accuse himself." "[This] maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of constitutional enactment." Brown v. Walker, 161 U.S. 591, 596-597, 16 S. Ct. 644, 647, 40 L. Ed. 819 (1896), quoted in *Miranda*, supra, 384 U.S. at 442-443, 86 S. Ct. 1602.

In *Bram* Justice White, later the Chief Justice, explored the "quantum of proof" necessary to show the voluntariness of a confession. The current vitality of his approach is attested by the recent and extensive reliance on his opinion.[1] He expressly declared that in the court's determination whether to admit a confession "any doubt as to whether the confession was voluntary must be determined in favor of the accused." 168 U.S. at 565, 18 S. Ct. at 195. In Harrold v. Territory of Oklahoma, 169 F. 47, 53-54 (8th Cir. 1909), Judge Sanborn cited *Bram* and spelled out its requirement:

> The burden was upon the prosecutor to prove to the court that the confession was voluntary, that it was not influenced by compulsion, hope, fear, or other inducement of any sort, and, if the evidence failed to establish that fact beyond a reasonable doubt, it was the duty of the court to reject the confession.

Other decisions that applied the same rule are cited in the footnote.[2] This aspect of *Bram* was not applied in the Dis-

[1] In addition to *Miranda* and *Malloy*, noted in the text, see, *e.g.*, Escobedo v. State of Illinois, 378 U.S. 478, 485-486, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964); Mapp v. Ohio, 367 U.S. 643, 656-657, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

[2] Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W. 2d 928 (1943); State v. Wilson, 217 La. 470, 46 So. 2d 738 (1950), aff'd per curiam, 341 U.S. 901, 71 S.Ct. 611, 95 L.Ed. 1341 (1951).

trict of Columbia, where "voluntariness" was for determination by the jury under the reasonable doubt standard, and local "law and practice" contemplated submission of the confession to the jury without a finding of voluntariness by the court. Wright v. United States, 102 U.S. App. D.C. 36, 45, 250 F.2d 4, 13 (1957). Prior to Jackson v. Denno there was no ruling that the Constitution required a judicial determination of voluntariness.

That the court making the determination of voluntariness required of the court by Jackson v. Denno should be governed by the standard of being convinced beyond a reasonable doubt, and not by the analytically lower standard of proof to the "satisfaction of the court" which governs findings of fact involved in ordinary rulings on evidence, is attributable to the distinctive nature of the voluntariness determination. It has the deepest roots in our Constitution and system of jurisprudence. And it relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury. The very introduction of an involuntary confession is a denial of constitutional rights so prejudicial as to vitiate the conviction irrespective of the quantum of other untainted evidence demonstrating the guilt of the accused.[3]

Plainly the jury must disregard a confession unless they find it voluntary beyond a reasonable doubt. That was recognized by both federal and state courts in both the pre-*Jackson* era[4] and in the post-*Jackson* cases wherein this

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[3]See, *e.g.*, Payne v. State of Arkansas, 356 U.S. 560, 567-568, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958); Blackburn v. State of Alabama, 361 U.S. 199, 210, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960); Rogers v. Richmond, 365 U.S. 534, 540-541, 81 S. Ct. 735, 5 L.Ed. 2d 760 (1961); Haynes v. State of Washington, 373 U.S. 503, 518-520, 83 St.Ct. 1336, 10 L.Ed. 2d 513 (1963).

[4]*E.g.*, Smith v. United States, 268 F.2d 416, 421 (9th Cir. 1959); Smith v. State, 189 Md. 596, 56 A.2d 818, 822 (1948); State v. Gidron, 211 S.C. 360, 45 S.E. 2d 587 (1947).

issue was re-submitted to the jury.[5]

In *Jackson* the Supreme Court held that procedures in the trial court must "be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." 378 U.S. at 391, 84 S. Ct. at 1788. So important is the need for reliability that the basic and primary determination must be made by the court. This is not to derogate from the jury as such, but to recognize the prejudice inhering in the admixture of a determination of voluntariness together with the jury's inescapable consideration of reliability of the confession, and indeed ultimate guilt or innocence.

Certainly the need for a finding beyond a reasonable doubt must govern the judge operating under the orthodox, or Wigmore, rule, where the issue of voluntariness is not presented as such to the jury. And *Jackson* makes clear that the Supreme Court's approval of the Massachusetts rule rests on the premise that it provides as much protection as the orthodox rule in regard to the screening by the judge, which remains the basic determination safeguarding the accused even though the voluntariness is re-submitted to the jury. See 378 U.S. at 378 n. 8, 84 S. Ct. at 1781.

It is true that in Jackson v. Denno the Supreme Court did not expressly address itself to the question before us. But to me a reasonable doubt standard for the judge's determination of voluntariness ensues from the Court's reasoning as surely as Euclid's corollaries unfolded from his theorems. The decisive ruling in Jackson v. Denno is that

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[5]United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965); United States ex rel. Walden v. Pate, 350 F.2d 240, 243 (7th Cir. 1965), cert. denied, 384 U.S. 1018, 86 S.Ct. 1948, 16 L.Ed. 2d 1041 (1966); Whiteside v. United States, 346 F.2d 500, 506 n. 2 (8th Cir. 1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1946, 16 L.Ed. 2d 1025 (1966); Lopez v. State, 384 S.W. 2d 345, 348 (Tex.Crim.App. 1964), a companion case remanded on the same date as Jackson v. Denno, see 378 U.S. 567, 84 S.Ct. 1924, 12 L.Ed. 2d 1038 (1964).

it is the determination of voluntariness by the judge which is crucial to our constitutional liberties. Any redetermination by the jury may be "ultimate" in time but not in constitutional significance.

Practical considerations of proof underscrore the importance of the court's use of the reasonable-doubt standard, notwithstanding a later submission to the jury. There may be more evidence before the court than before the jury, for example the testimony of a defendant who dare not risk presentation of prior convictions to the jury. It would be unjust if such evidence raised a reasonable doubt only to find that this doubt was ignored by the judge, under the rule proclaimed by the majority, and was never available to the jury.

Finally attention should be called to the weight of the post-*Jackson* rulings that the judge must determine voluntariness of the confession beyond a reasonable doubt. States that applied this standard prior to *Jackson* have continued it.[6] Rulings to this effect appear not only in jurisdictions applying the orthodox rule,[7] but also in jurisdictions, like New York, which resubmit the issue of voluntariness to the jury.[8] The standard has been adopted even where the court expressly took into account that it was dealing with a rule of evidence.[9]

The view I hold is the result reached not only by the Fourth Circuit but also, so far as I am aware, by every

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[6]*E.g.*, State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966).

[7]State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed. 2d 1039 (1966); State v. Keiser, 274 Minn. 265, 143 N.W. 2d 74, 79 (1966).

[8]United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965); State v. Longmore, 178 Neb. 509, 134 N.W. 2d 66 (1965); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y. S.2d 838, 204 N.E. 2d 179 (1965).

[9]See State ex rel. Goodchild v. Burke, supra note 7, 133 N.W. 2d at 763.

other court that has analyzed *Jackson* in its opinion. And it is not without significance that the majority have not adduced any post-*Jackson* ruling discarding the reasonable doubt standard for the trial judge which they can champion as authoritative.[10]

2. Assuming, however, that the reasonable doubt standard for the judge is not a constitutional prerequisite in a jurisdiction where the issue is resubmitted to the jury, the reasonable doubt standard for the judge should be enunciated in the exercise of our responsibility to exercise supervisory powers over the administration of justice in the District of Columbia. *Cf.* Tate v. United States, 123 U.S. App. D.C. 261, 359 F.2d 245, 252 (1966), and cases cited. I see no reason for our rejection of a rule approved by the Supreme Court in *Bram* and recently adopted by both federal and state courts (see notes 7-9 *supra*) as an incident of Jackson v. Denno.

3. However, the requirement that a reasonable doubt standard govern the judge's determination of voluntariness should not, in my view, be applied retroactively to a conviction which became final some sixteen years before *Jackson* was decided.

Jackson v. Denno is plainly retroactive in the sense that it applies to cases even though judgment has already become final, so as to require a judicial determination of voluntariness when there was no judicial screening of the issue prior to its presentation to the jury in a setting likely to preju-

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[10]Since my brethren agree that the reasonable doubt standard must govern the trial court in "orthodox" states, they obviously would ascribe no authoritative quality to People v. Golson, 32 Ill. 2d 398, 207 N.E. 2d 68 (1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1951, 16 L.Ed. 2d 1026 (1966), cited by the majority *supra* note 12. Rather, it illustrates how a few states have failed to come to grips with problems raised by Jackson v. Denno. This is an orthodox jurisdiction court that failed even to cite *Jackson*—and slipped into the indefensible result that in Illinois neither the court nor the jury is required to determine beyond a reasonable doubt that the confession is voluntary. This issue was not raised by the certiorari petition filed in *Golson*.

dice a defendant.[11] This does not govern the question whether similar retroactivity is requisite in a case where there was a preliminary judicial determination but it is contended that although the judge was satisfied of voluntariness he was not convinced beyond a reasonable doubt.

There are substantial considerations for withholding retroactivity as to this aspect of Jackson v. Denno. The fact that the judge was independently "satisfied" of voluntariness removes the most serious prejudice, the prejudice that appears in the case where "some evidence" was enough to bring the confession into the juryroom. There is only a relatively narrow zone of cases in which a judge in a criminal matter will be "satisfied" of voluntariness though he harbors a reasonable doubt.

On the other side of the coin lie considerations of judicial administration. Whether consideration is to be by the same or another judge, it becomes extraordinarily difficult of ascertainment whether a judge who was convinced of voluntariness was or was not convinced beyond a reasonable doubt. The extra margin of convincement assured by the reasonable-doubt standard is an elusive matter difficult to define. Compare McGill v. United States, 121 U.S. App. D.C. 179, 185, 348 F.2d 791, 797 (1965). Applying this standard is difficult enough at trial. The difficulty is enormously increased if the trial has long since been concluded and there is injected in the equation such imponderables as the lack of demeanor evidence of witnesses not now before the court, failure of recollection with the passage of time, inability to reconstruct the atmosphere of the trial. And, of course, a judge at a pre-*Jackson* trial would have had no

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[11] See Johnson v. State of New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Linkletter v. Walker, 381 U.S. 618, 628, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965); McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed. 2d 104 (1964); Mitchell v. Stephens 353 F.2d 129, 144 (8th Cir. 1965), cert. denied, 384 U.S. 1019, 86 S.Ct. 1966, 16 L.Ed.2d 1042 (1966); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965); Commonwealth ex rel. Butler v. Rundle, 416 Pa. 321, 206 A.2d 283, 286 (1965).

occasion to make a particular note of the depth of his conclusion.

In considering whether this aspect of Jackson v. Denno should be applied retroactively, we cannot ignore the fact of the course of decisions in the District of Columbia which did not follow the *Bram* forebear. *Cf.* Linkletter v. Walker, *supra* note 11, at 636 of 381 U.S., at 1741 of 85 S. Ct. It does not matter whether this was right or wrong under the non-constitutional doctrines then deemed applicable; whether it was due to the fact that *Bram* was overlooked, or was then regarded as a poorly considered opinion, whether perhaps the courts felt free to fashion a different common law rule for the District of Columbia treated as a state than the rule applicable in other federal courts. The fact remains that *Bram's* reasonable doubt standard for judges was dormant at best and was not revitalized until Jackson v. Denno.

As the Supreme Court's decisions make clear, the retroactivity issue is not a matter of absolutes. A balance must be struck in terms of the degree of unfairness of what was done and the practical quagmires of correction. As the Court noted in Johnson v. State of New Jersey, *supra* note 11, at 729, of 384 U.S., 86 S. Ct. 1772, it is essentially concerned with a "matter of degree," a "question of probabilities."

In my view the overall interest of justice is achieved by ruling that this aspect of Jackson v. Denno—that the judge must be convinced of voluntariness beyond a reasonable doubt even where the issue is also submitted to the jury—is requisite for subsequent trials, but need not be accorded retrospective application.[12]

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[12]Compare Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Thornton v. United States 125 U.S.App.D.C. ____, 368 F.2d 822 (1966).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5037

DON RICHARD LEGO,

Petitioner,

vs.

JOHN TWOMEY, Warden,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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